Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

WENDELL NANCE, SR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005), should apply retroactively to cases on collateral review.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iv
OPINIONS AND ORDERS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 1
REASONS FOR GRANTING THE WRIT 6
I. The Retroactivity Question Is A Crucially Important One That This Court Should Decide. 7
II. The Decisions Of The Seventh Circuit And The Other Courts Of Appeals Are Inconsistent With This Court's Retroactivity Precedents 10
CONCLUSION 16

Appendix A
Order, *Nance v. United States of America*, No 2002-cv-4117-JPG (S.D. Ill. Jan. 26, 2004) 1a

Appendix B
Order, *Nance v. United States of America*, No 2002-cv-4117-JPG (S.D. Ill. Feb. 26, 2004) 7a

Appendix C
Judgment in a Civil Case, *Nance v. United States of America*, No 2002-cv-4117-JPG (S.D. Ill. Jan. 26, 2004) 9a

Appendix D
Order, *Nance v. United States of America*, No 04-1567 (7th Cir. June 22, 2004) 10a

Appendix E

Order, *Nance v. United States of America*, No 04-1567 (7th Cir. July 22, 2004) 11a

Appendix F

Order, *Nance v. United States of America*, No 04-1567 (7th Cir. Nov. 18, 2004) 13a

Appendix G

Order, *Nance v. United States of America*, No 04-1567 (7th Cir. Feb. 8, 2005) 14a

Appendix H

Constitutional Provisions Involved 15a

TABLE OF AUTHORITIES

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000) 2, 7

Beard v. Banks, 124 S. Ct. 2504 (2004) 11, 15

Blakely v. Washington, 124 S. Ct. 2531 (2004) 4, 7, 11

Coleman v. United States, 329 F.3d 77 (2d Cir. 2003), *cert. denied*, 540 U.S. 1061 (2003) 11

In re Elwood, No. 05-30269, __F.3d __, 2005 WL 976998 (5th Cir. Apr. 28, 2005) 9

Guzman v. United States, 404 F.3d 139 (2d Cir. 2005) 8, 12

Hankerson v. North Carolina, 432 U.S. 233 (1977) 14

Humphress v. United States, 398 F.3d 855 (6th Cir. 2005) 8, 12

Ivan V. v. City of New York, 407 U.S. 203 (1972) 14

McReynolds v. United States, 397 F.3d 479 (7th Cir. 2005) 5, 6, 8, 12

Morris v. United States, 333 F. Supp. 2d 759 (C.D. Ill. 2004) 12

Mullaney v. Wilbur, 421 U.S. 684 (1975) 14

In re Olopade, 403 F.3d 159 (3d Cir. 2005) 9

People v. Johnson, No. 03CA2339, __P.3d__, 2005 WL 774416 (Colo. Ct. App. Apr. 7, 2005) 11

Rhodes v. Chapman, 452 U.S. 337 (1981) 15

Schriro v. Summerlin, 124 S. Ct. 2519 (2004) 7, 11, 12, 14, 15

Tyler v. Cain, 533 U.S. 656 (2001) 9

United States v. Booker, 125 S. Ct. 738 (2005) 4, 5, 6, 7, 9, 13

United States v. Huerta-Rodriguez, 355 F. Supp. 2d 1019 (D. Neb. 2005) 8, 13

United States v. Nance, 236 F.3d 820 (7th Cir. 2000), *cert. denied*, 534 U.S. 832 (2001) 1, 2, 3

United States v. Siegelbaum, 359 F. Supp. 2d 1104 (D. Or. 2005) 8, 13

Varela v. United States, 400 F.3d 864 (11th Cir. 2005) 8, 12

In re Winship, 397 U.S. 358 (1970) 14, 15

STATUTES

28 U.S.C. § 2253(c) 4

28 U.S.C. § 2255 9

U.S.S.G. § 2D1.1(b)(1) 3

U.S.S.G. § 2D1.1(c)(14) 3

MISCELLANEOUS

ALI Report, *Model Penal Code: Sentencing* (Apr. 11, 2003) 7

Federal Defender Servs. of Wisconsin, Inc., *The Doing Time*, Times (Spring 2005), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/laypersons_guide_to_booker.rtf 5

http://sentencing.typepad.com/sentencing_law_and_policy/2004/07/thoughts_and_ho.html 14

http://sentencing.typepad.com/sentencing_law_and_policy/2005/03/handling_blakel.html 8

http://sentencing.typepad.com/sentencing_law_and_policy/2005/05/the_waiting_in.html 8

http://www.uscourts.gov/Press_Releases/estimate.pdf 8

Nancy J. King & Susan R. Klein, *Beyond* Blakely, 16 Fed. Sentencing Rep. 316 (2004) 13

Note, *Rethinking Retroactivity*, 118 Harv. L. Rev. 1642 (2005) 11, 13, 15

United States Sentencing Comm'n, *2002 Sourcebook of Federal Sentencing Statistics* 7

OPINIONS AND ORDERS BELOW

The unpublished order of the Court of Appeals vacating the Certificate of Appealability and affirming the judgment on the basis of *McReynolds v. United States*, 397 F.3d 479 (7th Cir. 2005), is reprinted at Pet. App. 14a.

The unpublished order of the District Court for the Southern District of Illinois denying the § 2255 motion is reprinted at Pet. App. 1a-6a.

JURISDICTION

The Court of Appeals entered its judgment on February 8, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The principal provision involved in this petition is the Sixth Amendment, which provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." Pet. App. 15a.

STATEMENT OF THE CASE

1. *Sentencing, direct appeal, and § 2255 motion.* Wendell Nance, Sr. was charged and, after a jury trial, convicted of conspiring to distribute crack cocaine, in violation of 21 U.S.C. §§ 846 and 841(a)(1). His indictment said nothing about drug quantity, charging only that he had conspired "to knowingly and intentionally distribute a mixture and substance containing cocaine base," and the jury did not consider or make any findings as to the quantity of drugs involved in his alleged distribution scheme. *United States v. Nance*, 236 F.3d 820, 823 (7th Cir. 2000), *cert. denied*, 534 U.S. 832 (Oct. 1, 2001).

At the sentencing stage, the judge determined by a preponderance of the evidence that "the [drug] amount fell between 50 grams and 150 grams of crack," and on that basis found a base offense level of 32 under the Sentencing Guidelines. *Id.* (citing U.S.S.G. § 2D1.1(c)(4)). The judge also found by a preponderance of the evidence that a 2-level increase in offense level for possession of a dangerous weapon should be imposed, although the jury had not made any determination on that matter either. In light of these findings and the judge's calculation of Nance's criminal history category, the Sentencing Guidelines prescribed a sentence in a range the low end of which was more than 200 months' imprisonment. On March 28, 2000, the district court sentenced Nance to 262 months of imprisonment and five years of supervised release. *See id.*

On direct appeal, the Seventh Circuit permitted Nance to raise the argument that his sentence was unlawful under this Court's then-recent decision in *Apprendi v. New Jersey*, 530 U.S. 466 (June 26, 2000), which established the principle that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The Court of Appeals held that Nance's sentence could not be reconciled with that decision. *See Nance*, 236 F.3d at 822. The panel noted that his "sentence exceeded the statutory maximum of 20 years found in 21 U.S.C. § 841(b)(1)(C)," which applies based solely on drug type (rather than amount), and explained that "a sentence as long as [Nance's] is available only under 21 U.S.C. § 841(b)(1)(B)(iii), which permits a sentence of up to 40 years in prison for a violation that involves 5 grams or more of cocaine base, or under 21 U.S.C. § 841(b)(1)(A)(iii), which permits even a life sentence if 50 grams or more of cocaine base are involved." *Id.* at 824. Thus, "[u]nder *Apprendi*, before [Nance] could receive a

sentence greater than 20 years but no more than 40 years, the indictment should have charged that he had conspired to distribute 5 grams or more of the cocaine base mixture and that issue should have been submitted to the jury and proven beyond a reasonable doubt by the government." *Id.* at 825. The issue was not so submitted and proven; the Court concluded, however, that "review is for plain error only, and on the record of this case there is none." *Id.* at 822.

Notably, not only was Nance's sentence in excess of the statutory maximum applicable based on the facts found by the jury, it was also far in excess of the maximum sentence that could have been imposed under the Sentencing Guidelines pursuant to the facts established by the jury verdict. *See, e.g.*, U.S.S.G. § 2D1.1(c)(14) (setting a base offense level of 12 for an offense involving less than 250 mg of cocaine base); *id.* § 2D1.1(b)(1) (discussing enhancement for possession of dangerous weapon).

Nance timely filed a § 2255 motion on June 7, 2002, alleging that he was denied his Sixth Amendment right to the effective assistance of counsel and arguing that he had received a sentence a minimum of 22 months longer than that allowed by law. The district court denied the motion on January 26, 2004. The court held that counsel had not acted unreasonably in failing to raise an *Apprendi*-type objection to Nance's sentence, and that Nance had not demonstrated sufficient prejudice under the *Strickland* standard. *See* Pet. App. 5a.

The district court then denied Nance's motion for a Certificate of Appealability ("COA"). The Seventh Circuit also initially denied Nance's application for a COA, but on consideration of Nance's July 12, 2004 Petition for Rehearing issued a COA "on the issue of whether his sentence is unconstitutional under *Blakely v. Washington*, 124 S. Ct. 2531 ([June 24,] 2004)," Pet. App. 11a-12a, which

addressed a state sentencing scheme and held that "the 'statutory maximum' for *Apprendi* purposes" is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 124 S. Ct. at 2537. The Court of Appeals thus concluded that Nance had made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). The Court then stayed proceedings in the case "pending the Supreme Court decision in *United States v. Booker*, No. 04-104, and *United States v. Fanfan*, No. 04-105." Pet. App. 13a.

2. *Booker* and *McReynolds* decisions. On January 12, 2005, this Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005), extended the holding of *Blakely* to the United States Sentencing Guidelines, finding "no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue" in *Blakely*. *Id.* at 749. This Court held that the Constitution requires that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at 756.

In the remedial portion of the opinion, which made the Guidelines "effectively advisory," this Court characterized the *Booker* holding as a "new rule" and addressed the effect of its decision on cases pending on direct review, but did not make any statement about the appropriate treatment of cases on collateral review:

> As these dispositions indicate, we must apply today's holdings – both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act – to all cases on direct review. *See Griffith v. Kentucky*, 479 U.S. 314, 328 . . . (1987) ("[A] new rule for the

> conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past"). . . . That fact does not mean that we believe that every sentence gives rise to a Sixth Amendment violation. Nor do we believe that every appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain error' test. It is also because, in cases not involving a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon application of the harmless-error doctrine.

125 S. Ct. at 769.

Three weeks after this Court's decision issued, the Seventh Circuit held in *McReynolds v. United States*, 397 F.3d 479 (7th. Cir. 2005), that *Booker* was not retroactive to cases on collateral review. In a decision reached without briefing on the merits of the issue (and without counsel assisting the *pro se* prisoners who had applied for COAs), the Seventh Circuit characterized *Booker* as a "procedural" decision for purposes of retroactivity analysis, and concluded that the constitutional principles that *Booker* explicated do not qualify as "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* at 481 (quoting *Schriro v. Summerlin*, 124 S. Ct. 2519, 2522 (2004), and *Teague v. Lane*, 489 U.S. 288, 311 (1989)); *see also* Federal Defender Servs. of Wis., Inc., *The Doing Time,* Times at 11-12 (Spring 2005), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/laypersons_guide_to_booke

r.rtf. The Court of Appeals based this conclusion on its determination that "the choice between judges and juries as factfinders does not make such a fundamental difference," and that "*Booker* does not in the end move any decision from judge to jury, or change the burden of persuasion." *McReynolds*, 397 F.3d at 481.

3. *Seventh Circuit order*. *McReynolds* sounded the death knell for Nance's § 2255 motion, as well as the motions of many other similarly situated prisoners in that Circuit. *See McReynolds*, 397 F.3d at 481 (noting that decision "affects a substantial volume of post-*Booker* litigation"). On February 8, 2005, without permitting the briefing on the retroactivity question that Nance had requested, the Seventh Circuit issued a terse unpublished order vacating Nance's certificate of appealability and affirming the district court judgment denying his motion "[i]n light of this court's opinion in *McReynolds v. United States*." Pet. App. 14a.

REASONS FOR GRANTING THE WRIT

Nance's sentence is indisputably unconstitutional under *Booker*. The sentence was imposed pursuant to the invalidated mandatory Guidelines scheme, and the judge – using a preponderance of the evidence standard – found numerous facts relating to drug quantity and weapon possession that gave rise to a sentence that exceeded the maximum sentence "authorized by the facts established by . . . [the] jury verdict" in his case. *Booker*, 125 S. Ct. at 756. The question now is whether Nance can benefit from the *Booker* holding – i.e., whether that holding is retroactive to cases on collateral review. This is an important question significantly affecting many thousands of prisoners, and one that will be litigated over and over again until this Court finally decides it. It is also a question as to which the Seventh Circuit and other Courts of Appeals have reached a conclusion that misapplies this Court's decision in *Schriro v.*

Summerlin, 124 S. Ct. 2519 (2004), and is otherwise inconsistent with this Court's own retroactivity precedents. Thus, review by this Court is manifestly appropriate.

I. The Retroactivity Question Is A Crucially Important One That This Court Should Decide.

The retroactivity question that this Court left open in *Booker* is of crucial importance to Nance and to thousands of other federal prisoners whose convictions and sentences became final prior to January 12, 2005 and whose sentences were enhanced based on judicial findings made under a preponderance of the evidence standard. *See Blakely*, 125 S. Ct. at 2549 & n.2 (O'Connor, J., dissenting) (noting several hundred thousand prisoners sentenced in federal court between 2000 and 2004); United States Sentencing Comm'n, *2002 Sourcebook of Federal Sentencing Statistics*, at Table 2; *see also Booker*, 125 S. Ct. at 773-74 (Stevens, J., dissenting) (discussing possible percentage of federal sentencings affected by Sixth Amendment problems); *Apprendi*, 530 U.S. at 476 (stating that the constitutional protections against judges increasing sentences based on facts not proved beyond a reasonable doubt are "of surpassing importance"). These prisoners are serving sentences imposed pursuant to procedures that this Court has held to violate the Constitution, and have a real prospect of obtaining an earlier release if they are resentenced in a constitutionally appropriate manner – after all, it is only an "accident of timing" that differentiates them from the similarly situated defendants who have since the *Booker* decision been granted their full Sixth Amendment and Due Process rights. *Summerlin*, 124 S. Ct. at 2529 (Breyer, J., dissenting); *see also, e.g.*, ALI Report, *Model Penal Code: Sentencing* 124 (Apr. 11, 2003).

Not surprisingly, then, many prisoners have filed § 2255 motions in just the few months since *Booker* was decided.

The Courts of Appeals that have addressed these motions have all ruled that *Booker* is not retroactive to cases such as Nance's that are no longer pending on direct review. *See Guzman v. United States*, 404 F.3d 139, 140-41 (2d Cir. 2005); *Varela v. United States*, 400 F.3d 864, 867-68 (11th Cir. 2005); *Humphress v. United States*, 398 F.3d 855, 863 (6th Cir. 2005); *McReynolds*, 397 F.3d at 480-81; *see also United States v. Price*, 400 F.3d 844, 848-49 (10th Cir. 2005) (holding that new rule announced in *Blakely* is not retroactive to cases on collateral review). A few district courts have indicated their disagreement with this conclusion, albeit in dicta. *See United States v. Siegelbaum*, 359 F. Supp. 2d 1104 (D. Or. 2005); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1028 n.9 (D. Neb. 2005).

This flood of litigation over the threshold retroactivity question places a significant burden on the federal district courts and the rest of the federal system, which could more fruitfully devote resources to remediating the constitutional violations that occurred under the Guidelines regime. *See e.g.*, http://www.uscourts.gov/Press_Releases/estimate.pdf (Judicial Conference memo estimating 12,000 to 18,000 new § 2255 motions based on *Booker* and requesting millions of dollars in additional funding); http://sentencing.typepad.com /sentencing_law_and_policy/2005/03/handling_blakel.html (noting that this estimate is low and does not count the habeas petitions based on *Blakely* that will be filed by state prisoners). But the flood will not cease until this Court definitively determines the issue, even if the Courts of Appeals are ultimately unanimous on the retroactivity question. *See* http:// http://sentencing.typepad.com/ sentencing_law_and_policy/2005/05/the_waiting_in_.html (May 4, 2005 entry by Prof. Douglas Berman listing retroactivity as one of the post-*Booker* issues most urgently requiring this Court's attention and stating that "retroactivity issues will be litigated over and over and over again in the

lower courts until the Supreme Court definitively rules," while other issues – as to which the Circuits have disagreed – "will eventually fade away even without a definitive Supreme Court ruling"). This is at least in part due to the fact that under § 2255 and this Court's decision in *Tyler v. Cain*, 533 U.S. 656 (2001), only this Court may make a new rule of constitutional law "retroactive to cases on collateral review" so as to authorize second or successive § 2255 motions that rely on such a new rule. 28 U.S.C. § 2255; *see Tyler*, 533 U.S. at 663 (addressing language in 28 U.S.C. § 2244(b)(2) that is identical to the relevant language in § 2255 and stating that "under this provision, the Supreme Court is the *only entity* that can 'ma[k]e' a new rule retroactive" (emphasis added) (alteration in original)); *In re Elwood*, No. 05-30269, __ F.3d __, 2005 WL 976998, at *2-3 (5th Cir. Apr. 28, 2005) ("The new rule becomes retroactive, not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court." (internal quotation marks omitted)); *In re Olopade*, 403 F.3d 159, 162-64 (3d Cir. 2005).

Thus, petitioners with legitimate constitutional grievances will continue to try to bring *Booker* retroactivity cases to this Court until this Court decides the issue. This Court should step in now and give the affected prisoners and the lower courts certainty and clarity on the critically important question of *Booker*'s retroactivity. Such a decision will make complete this Court's careful instructions about the effect of its constitutional ruling on the administration of the federal criminal justice system. *See Booker*, 125 S. Ct. at 756-69.

II. The Decisions Of The Seventh Circuit And The Other Courts Of Appeals Are Inconsistent With This Court's Retroactivity Precedents.

In *McReynolds*, the decision on which the Court of Appeals order in the instant case was premised, the Seventh Circuit found this Court's decision in *Schriro v. Summerlin,* 124 S. Ct. 2519 (2004), to be "all but conclusive" of the question of whether *Booker* applies retroactively to cases on collateral review. Other Circuits have employed a similar analysis to reject *Booker* retroactivity arguments. But *Summerlin*, which addressed only whether the reallocation of factfinding responsibility from a judge to a jury constitutes a "watershed" rule of criminal procedure, is not by any means dispositive of the *Booker* retroactivity issue. *Booker* involved *two different* constitutional principles: the identity of the factfinder (jury rather than judge) and the rigor of the standard of proof (beyond a reasonable doubt rather than preponderance of the evidence). This Court's precedents establish that *Booker*'s holding that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury *beyond a reasonable doubt*" is a watershed rule that significantly improves the accuracy of criminal proceedings and therefore must be applied retroactively to cases such as Nance's – and the Court of Appeals rulings to the contrary conflict with these binding decisions.

In *Teague v. Lane,* 489 U.S. 288 (1989) (plurality op.), this Court held that a new procedural rule applies retroactively if it is a "watershed rule[] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. . . . That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule

must be one without which the likelihood of an accurate conviction is *seriously* diminished." *Summerlin*, 124 S. Ct. at 2523 (quoting *Teague*) (internal quotation marks omitted); *see also Beard v. Banks*, 124 S. Ct. 2504, 2513-14 (2004). (noting that the "watershed rule" category has a very "limited scope"); Note, *Rethinking Retroactivity*, 118 Harv. L. Rev. 1642, 1644 (2005) (identifying concern with accuracy as the central thrust of this Court's retroactivity precedents).[1]

Applying this test in *Summerlin*, this Court refused to declare *Ring v. Arizona*, 536 U.S. 584 (2002) – a decision that was an outgrowth of *Apprendi* – retroactive to cases on collateral review. *Ring* required juries rather than judges to find the aggravating factors that qualify a defendant for the death penalty. *Summerlin* held that this new rule of procedure did not "implicat[e] the fundamental fairness and accuracy of the criminal proceeding," because there is no guarantee that juries are any more accurate than judges in

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[1] Petitioner does not for purposes of this petition contest that the rules set forth in *Booker* are "new" and "procedural" for purposes of retroactivity analysis, but preserves the contrary arguments for further proceedings. *See, e.g., Blakely*, 124 S. Ct. at 2549 (O'Connor, J., dissenting) ("And, despite the fact that we hold in *Schriro v. Summerlin* . . . that *Ring* (and *a fortiori Apprendi*) does not apply retroactively on habeas review, all criminal sentences imposed under the federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack."); *People v. Johnson*, No. 03CA2339, __ P.3d __, 2005 WL 774416, at *2 (Colo. Ct. App. Apr. 7, 2005) (holding that "[b]ecause *Blakely* explains and clarifies *Apprendi*, we apply it retroactively to defendant's sentence, which was imposed after *Apprendi* was announced"); *Coleman v. United States*, 329 F.3d 77, 91 (2d Cir. 2003) (Parker, J., concurring in the judgment) (arguing that *Apprendi* should apply retroactively on the ground that it "alter[ed] the meaning of a criminal statute" by characterizing sentencing factors as elements of a crime), *cert. denied*, 540 U.S. 1061 (2003).

making death penalty determinations. *Summerlin*, 124 S. Ct. at 2524 (internal quotation marks omitted). But the *Summerlin* Court expressly noted that its decision did not address any burden of proof issues; the facts of *Ring* simply did not present such issues, because the sentencing provisions overturned in *Ring* "already required aggravating factors to be proved beyond a reasonable doubt" to judicial factfinders. *Id.* at 2522 n.1 (explaining that the burden of proof "aspect of *Apprendi* was not at issue").

Nevertheless, the Seventh Circuit and the other Courts of Appeals that have ruled on whether *Booker* is available to habeas petitioners have relied on *Summerlin* as effectively dispositive of the *Booker* retroactivity analysis. Indeed, in several Circuits, citation to *Summerlin* has been the beginning and the end of the analysis. *See McReynolds*, 397 F.3d at 480 (stating that "[a]lthough the Supreme Court did not address the retroactivity question in *Booker*, its decision in *Schriro v. Summerlin* . . . is all but conclusive on the point"); *see also Varela*, 400 F.3d at 866-68 ("While neither this Court nor the Supreme Court has addressed the retroactivity of *Blakely* or *Booker* in the context of a § 2255 motion, the Supreme Court's recent decision in *Schriro v. Summerlin* . . . is essentially dispositive. . . . The Supreme Court's statements in *Schriro* regarding the *Ring* rule also apply to *Booker*."); *Humphress*, 398 F.3d at 863 ("The Supreme Court's decision in *Schriro* is highly instructive as to whether *Booker*'s is a watershed procedural rule. . . . *Schriro*'s reasoning applies with equal force to *Booker*."); *Guzman*, 404 F.3d at 143; *see also, e.g., Morris v. United States*, 333 F. Supp. 2d 759, 771-72 (C.D. Ill. 2004).

But this analysis has a fatal flaw. The requirement that sentencing determinations be made under a rigorous standard of proof is central to *Booker*'s constitutional holding – and *Summerlin*, which is premised on the accuracy of judicial

factfinding, admittedly does not speak to the retroactivity of such a burden-of-proof requirement. *See Booker*, 125 S. Ct. at 748 ("It has been settled throughout our history that the Constitution protects every criminal defendant 'against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' . . . It is equally clear that the Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." (quoting *In re Winship*, 397 U.S. 358, 364 (1970) (internal quotation marks omitted)).

A few district courts have noted this analytical flaw in the application of *Summerlin* to the question of *Booker*'s retroactive application, and a number of commentators have also remarked upon it. *See, e.g.*, *Siegelbaum*, 359 F. Supp. 2d at 1107 ("[*Summerlin*] addressed only the allocation of factfinding responsibility between the judge and jury. There is a second component to *Blakely/Booker* that [*Summerlin*] did not address, namely, that facts used to enhance a sentence, if not admitted, must be proven beyond a reasonable doubt rather than by a preponderance of the evidence."); *Huerta-Rodriguez*, 355 F. Supp. 2d at 1028 n.9 ("Although a misallocation of factfinding responsibility (judge versus jury) does not warrant retroactive application, the same cannot be said for the retroactivity of application of a preponderance of evidence standard as opposed to a reasonable doubt standard."); *Rethinking Retroactivity*, 118 Harv. L. Rev. at 1663 n.144 ("Most commentators have agreed that *Summerlin* has no analytical implication for *Apprendi*'s collateral retroactivity . . . ."); Nancy J. King & Susan R. Klein, *Beyond* Blakely, 16 Fed. Sentencing Rep. 316, 323-25 (2004) (distinguishing *Summerlin*'s analysis from an assessment of the retroactivity of *Apprendi* and concluding that "the Court in *Summerlin* addressed only the retroactivity of the right-to-jury holding of *Ring*");

http://sentencing.typepad.com/sentencing_law_and_policy/2004/07/thoughts_and_ho.html. Nevertheless, without this Court's guidance, the juggernaut of *Summerlin* reliance seems likely to continue.

In focusing solely on *Summerlin*, the decisions of the Courts of Appeals are not only analytically incomplete, but also reach a conclusion that is inconsistent with this Court's retroactivity precedents. In *In re Winship*, 397 U.S. 358 (1970), which this Court relied upon in *Apprendi* and *Booker*, the Court held that the Constitution "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364; *see also id.* at 363-64 (explaining that "the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law"); *Mullaney v. Wilbur*, 421 U.S. 684, 703-04 (1975). In recognition of the improved accuracy afforded by the fundamental beyond-a-reasonable-doubt standard, this Court later made *Winship* fully applicable to cases on collateral review. *See Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (holding that purpose of reasonable doubt standard is "to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect"); *Hankerson v. North Carolina*, 432 U.S. 233, 240-44 (1977) (giving retroactive effect to rule requiring proof of all elements of crime beyond a reasonable doubt and voiding presumptions that shift burden of proof to defendant). While these retroactivity cases were decided prior to *Teague*, they are fully consistent with *Teague*'s reasoning. *Cf. Summerlin*, 124 S. Ct. at 2525 (deeming pre-*Teague* retroactivity case "germane" to *Teague* analysis).

Indeed, it *must* be the case that *Booker*'s burden of proof holding falls within the narrow category of watershed

procedural rules. There can be no doubt that "[t]he reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. at 363; *see also id.* at 372 (Harlan, J., concurring) (characterizing reasonable doubt standard as a protection of "fundamental procedural fairness" and a defendant's "transcending value . . . [in] his liberty"). Thus, *Booker*'s burden of proof requirement speaks directly and seriously to the accuracy of criminal proceedings – which is the heart of the retroactivity test, as *Summerlin* itself makes clear. *See Summerlin*, 124 S. Ct. at 2525-26; *Rethinking Retroactivity*, 118 Harv. L. Rev. at 1644, 1660 n.133. And this requirement, while rooted in a deep tradition, also represents an extraordinary, fundamental shift in understanding of the constitutional requirements applicable to federal sentencing. *Compare Beard*, 124 S. Ct. at 2514-15.

This Court should resolve the inconsistency between its precedent and the Seventh Circuit ruling at issue in this case to make clear that Nance and other prisoners like him deserve the benefit of the fundamental *Booker* burden-of-proof rule. It is true that *Booker* retroactivity may place burdens on the federal system – but continued litigation of the threshold retroactivity question is also burdensome, and the law should be clarified. *See Rhodes v. Chapman*, 452 U.S. 337, 359 (1981) ("Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations." (internal quotation marks omitted)); *see also Rethinking Retroactivity*, 118 Harv. L. Rev. at 1661 ("*Teague* – unlike the earlier test . . . – made no mention of administrative cost as a factor to be considered in determining the scope of collateral retroactivity. Further, courts should remember that Congress is free to circumscribe collateral retroactivity by statute.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 9, 2005

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Appendix A

United States District Court
For The Southern District Of Illinois

WENDELL NANCE, SR., Petitioner/Defendant,	)	
	)	No. 2002-cv-4117-JPG
v.	)	
UNITED STATES OF AMERICA Respondent/Plaintiff.	)	

ORDER

GILBERT, District Judge:

This matter comes before the Court on Petitioner's 28 U.S.C. § 2255 motion for modification or correction of sentence. (Doc. 1). The Government responded (Doc. 5) and Petitioner has replied. (Doc. 6). For the reasons discussed below, the petition will be DENIED.

DISCUSSION

The Court assumes that the parties are familiar with the underlying facts of this case; only those portions relevant to the disposition of this petition will therefore be recounted. On direct appeal, the Seventh Circuit rejected Petitioner's claim (as not constituting plain error) that the failure to regard the quantity of drugs involved in his crime as an element of the offense (*see Apprendi v. New Jersey*, 530 U.S. 466 (2000)) required invalidation of the resulting sentence enhancement imposed by this Court. *United States v. Nance*, 236 F.3d 820 (7th Cir. 2000). To be sure, the Circuit Court concluded that one of the facts extending Petitioner's

sentence beyond the normal guidelines range-relevant conduct in excess of 5 grams of crack cocaine-"should [have] be[en] regarded as an element of the offense []and hence as something . . . charged in the indictment, submitted to the jury, and proven by the government beyond a reasonable doubt." *Nance*, 236 F.3d at 823. Petitioner's small victory was short-lived, however. The Circuit Court found that "there [wa]s simply no way on this record that [a jury] could have failed to find that [Petitioner] was conspiring to distribute 5 grams or more of crack cocaine" and denied his claim. *Nance*, 236 F.3d at 826. Three sources of evidence supported that conclusion, any one of which "standing alone would have done the job." *Nance*, 236 F.3d at 826. But in the course of its discussion, the Circuit Court wrote something that planted the seeds for the instant petition. While discussing counsel's failure to object at trial to the *Apprendi*-type issue, the Circuit Court expressed its belief that a "responsible lawyer" would have preserved the issue by making the objection. *Nance*, 236 F.3d at 824 (emphasis added). By offering that opinion under the circumstances presented there-i.e., in a situation where trial counsel had not objected-the Circuit Court sent Petitioner the unequivocal message that his counsel had acted "irresponsibility." By way of 28 U.S.C. § 2255, Petitioner now asks this Court to equate "irresponsible" with "ineffective" and find that he was denied his right to the effective assistance of counsel.

> The Seventh Circuit has spoken clearly regarding Mr. Nance's circumstances, squarely blaming Mr. Nance's former counsel for failing to preserve the *Apprendi*-related issues before this court . . .
>
> It is clear from the opinion of the Court of Appeals that counsel should have raised the issue of Mr. Nance's applicable

> maximum sentence, if not by anticipating any change in the law under *Apprendi*, then under the law as it then existed under Jones; counsel was obviously not 'a responsible lawyer' when he failed to raise this issue. . . . Mr. Nance's claim thus satisfies the first prong under *Strickland [v. Washington*, 466 U.S. 668 (1984)].

(Doc. 2 at 7).

Resolution of this petition is neither close nor difficult. For one thing, the Sixth Amendment standard for the effective assistance of counsel is well-settled:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687. In terms of the first prong, *Strickland* explained that "the proper standard for attorney performance is that of reasonableness." *Strickland*, 466 U.S. at 687. Therein lies Petitioner's first error; being "wrong" is much different than being "unreasonable." In order words, to say that a judgment was in "error" is to suggest that it was "erroneous" or "incorrect." But to label a judgment "unreasonable" is to go one step further and conclude that it

was "objectively unreasonable." *Cf. Lockyer v. Andrade*, 538 U.S. ___ (2002).

In this case, the most one could squeeze from the Seventh Circuit's opinion is that counsel committed a "plain" or "obvious" error, not that his performance was constitutionally deficient or "unreasonable." In suggesting that Petitioner's lawyer was less-than-responsible for not objecting, the Circuit Court cited *Jones v. United States*, 526 U.S. 227 (1999), where the Supreme Court held that "the federal carjacking statute [] created three separate offenses, not just three sentencing levels for one offense, depending on the harm that the offender inflicted during the course of the crime." *Nance*, 236 F.3d at 823. (Significantly, the first such claim to reach the Seventh Circuit was presented in *United States v. Smith*, 223 F.3d 554 (7th Cir. 2000)-a case decided one year *after* trial in this case began). Apparently, however, the Circuit Court believed that a "responsible" lawyer would have seen the connection between *Jones*-a case decided a mere five weeks before Petitioner's trial began-and U.S.S.G. § 1B1.3's sentencing enhancement based on drug quantity. In an intuitive sense, five weeks would appear to be precious little time to expect a run-of-the-mill defense attorney to digest a United States Supreme Court case to the extent necessary to recognize its long-range implications; this feeling grows even stronger when Circuit precedent at the time was going in precisely the opposite direction. To that end, *Nance* conceded that *United States v. Edwards*, 105 F.3d 1179 (7th Cir. 1997), had rejected the claim that "the type of drug [defendants were charged with under 21 U.S.C. § 841] was an element of the offense that had to be proven to the jury beyond a reasonable doubt." *Nance*, 236 F.3d at 823. Perhaps this explains why the Seventh Circuit has since summarily rejected ineffective-assistance-of-counsel claims based on the failure to raise *Apprendi*-type objections (like

the one presented here), characterizing them as "untenable." *United States v. Smith*, 241 F.3d 546, 548 (7th Cir. 2001); *Valenzuela v. United States*, 261 F.3d 694, 700 (7th Cir. 2001). The other Circuit Courts to address this issue are in accord with this position, moreover. *See Brown v. United States*, 311 F.3d 875 (8th Cir. 2002); *United States v. Maass*, No. 01-1068, 2002 WL 1722050 (10th Cir. July 25, 2002), *United States v. Ardley*, 273 F.3d 991 (11th Cir. 2001). Therefore, Petitioner failed to establish *Strickland's* threshold requirement that trial counsel's performance was objectively unreasonable.

Even aside from this problem, Petitioner's claim would still fail for yet another reason. In addition to the deficient-performance requirement, a "defendant must show that there [wa]s a reasonable probability that, but for counsel's unprofessional errors, the result of a proceeding would have been different." *Strickland*, 466 U.S. at 693. "[O]nce [the Seventh Circuit] has decided the merits of a ground of appeal, that decision establishes the law of the case and is binding on a district judge asked to decide the same issue in a later phase of the same case, unless there is some good reason for reexamining it." *United States v. Mazak*, 789 F.2d 580, 581 (7th Cir. 1986). On direct appeal, the Seventh Circuit concluded that no jury "could have failed to find that [Petitioner] was conspiring to distribute 5 grams or more of crack cocaine." *Nance*, 236 F.3d at 826. It reached this conclusion, of course, based upon its own independent review of the record; and nothing has been offered that would permit this Court to find the "good cause" necessary to reexamine it. *Nance*, 236 F.3d at 826. Therefore, because the Circuit Court concluded that no jury could have failed to find beyond a reasonable doubt that Petitioner's relevant conduct was in excess of 5 grams, there is no "reasonable

probability" that the result of his sentencing proceeding would have been different.[1]

CONCLUSION

Petitioner's 28 U.S.C. § 2255 petition for a modification or correction of sentence (Doc. 1) is **DENIED**.

IT IS SO ORDERED.

Dated: January 26, 2004

/s/ J. Phil Gilbert
J. PHIL GILBERT
U.S. District Judge

---

[1] Petitioner cited *Glover v. United States*, 531 U.S. 198 (2001), for the proposition that "any lost opportunity for a reduced sentence constitutes prejudice under the *Strickland* standard, as any amount of jail time has Sixth Amendment significance." (Doc. 2 at 3). *Glover*, however, addressed a different question; it was premised on the existence of a reasonable probability that the result of the proceeding would have been different. (In that case it was more like a legal certainty-both sides conceded the fact that technically prejudicial legal error existed.) Such a probability doesn't exist here. As explained in the text, the Seventh Circuit has concluded that no jury could have failed to find beyond a reasonable doubt that Petitioner's relevant conduct exceeded 5 grams.

Appendix B

United States District Court
For The Southern District Of Illinois

WENDELL NANCE, SR., Petitioner/Defendant,	)	
v.	)	No. 2002-cv-4117-JPG
UNITED STATES OF AMERICA Respondent/Plaintiff.	)	

ORDER

GILBERT, District Judge:

This matter comes before the Court on two motions: (1) a 28 U.S.C. § 2253 motion for a certificate of appealability (Doc. 9), and (2) a 28 U.S.C. § 1915 motion to proceed in forma pauperis on appeal. (Doc. 10). To establish an entitlement to the former, one must demonstrate a "substantial denial of a constitutional right" such that the issue is "debatable among jurists of reason." *Miller-El v. Cockrell*, 537 U.S. 322 (2003). That showing cannot be made here; both of the issues raised by Petitioner's 28 U.S.C. § 2255 petition were squarely dictated by Circuit precedent. The certificate of appealability will therefore be DENIED. Second, among the items required for a court to evaluate whether to grant permission to proceed in forma pauperis on appeal is a statement of the issues he intends to present. Fed. R. App. P. 24(a)(1)(C). Because Petitioner did not present such a statement with his motion, it, too, must be DENIED.

CONCLUSION

Petitioner's motion for a certificate of appealability (Doc. 9) is **DENIED**. Petitioner's motion to proceed in forma pauperis on appeal (Doc. 10) is also **DENIED**.

IT IS SO ORDERED.

Dated: February 26, 2004

/s/ J. Philip Gilbert
J. PHIL GILBERT
U.S. District Judge

Appendix C

United States District Court
For The Southern District Of Illinois

WENDELL NANCE, SR., Petitioner/Defendant,	)	
	)	No. 2002-cv-4117-JPG
v.	)	
UNITED STATES OF AMERICA Respondent/Plaintiff.	)	

JUDGMENT IN A CIVIL CASE

Decision by Court. This matter having come before the Court on Petitioner's 28 U.S.C. 2255 Petition for modification or correction of sentence, and the Court having rendered its decision,

IT IS ORDERED AND ADJUDGED that Petitioner's 28 U.S.C. § 2255 Petition, in this case, is hereby **DENIED**.

DATE: January 26, 2004.

NORBERT G. JAWORSKI, CLERK

s/Judith Prock
Deputy Clerk

APPROVED: /s/ J Phil Gilbert
J. PHIL GILBERT
U.S. District Judge

Appendix D

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted June 18, 2004
Decided June 22, 2004

Before

HON. JOHN L. COFFEY, *Circuit Judge*
HON. MICHAEL S. KANNE, *Circuit Judge*

No. 04-1567

WENDELL NANCE, SR.,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Illinois.

No. 02 C 4117

J. Phil Gilbert, Judge

ORDER

Wendell Nance has filed a notice of appeal from the denial of his motion under 28 U.S.C. § 2255 and an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

Appendix E

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

July 22, 2004

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

No. 04-1567

WENDELL NANCE, SR.,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA
Respondent-Appellee.

On Petition for Rehearing and Rehearing En Banc.

ORDER

Upon consideration of the **PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC**, filed on July 9, 2004, by petitioner-appellant,

IT IS ORDERED that the petition for rehearing is **GRANTED**.

IT IS FURTHER ORDERED that the court **GRANTS** Nance a certificate of appealability on the issue of

whether his sentence is unconstitutional under *Blakely v. Washington*, 124 S. Ct. 2531 (2004). The parties are invited to address an antecedent procedural issues - for example, whether law of the case may bar consideration of this claim or whether Nance has procedurally defaulted the claim.

IT IS FINALLY ORDERED that the court sua sponte appoints counsel to represent Nance on appeal. A separate order will follow naming counsel and setting a schedule for briefing.

Appendix F

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 18, 2004

Before
Hon. DIANE P. WOOD, Circuit Judge

No. 04-1567

WENDELL NANCE, SR.,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Illinois.

No. 02 C 4117

J. Phil Gilbert, Judge.

ORDER

Upon consideration of the MOTION TO AMEND BRIEFING SCHEDULE, filed on November 12, 2004, by counsel for the appellant,

IT IS ORDERED that the motion is GRANTED. Proceedings in this case are STAYED pending the Supreme Court decision in *United States v. Booker*, No. 04-104, and *United States v. Fanfan*, No. 04-105. The parties shall file statements of position within 14 days after the Supreme Court opinion issues.

Appendix G

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted February 3, 2005
Decided February 8, 2005

Before

Hon. DIANE P. WOOD, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*
Hon. DIANE S. SYKES, *Circuit Judge*

WENDELL NANCE, SR., Petitioner-Appellant,	]	Appeal from the United States District Court for the Southern District of Illinois.
No. 04-1567 v.	]	
UNITED STATES OF AMERICA Respondent-Appellee.	]	No. 02 C 4117
	]	J. Phil Gilbert, Judge

ORDER

In light of this court's opinion in *McReynolds v. United States*, 2005 WL 237642 (7th Cir. Feb. 2, 2005), we VACATE the certificate of appealability and AFFIRM the district court judgment denying Nance's motion to vacate, 28 U.S.C. § 2255.

Appendix H

Constitutional Provisions Involved

U.S. Const. amend. VI. Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.